

(H.J.R. 12)

# CONSTITUTIONAL AMENDMENT C

## JOINT RESOLUTION ON APPOINTMENT OF LEGAL COUNSEL FOR EXECUTIVE OFFICERS

2014 GENERAL SESSION

SENATE VOTE: 24-1-4

HOUSE VOTE: 68-0-7

### BALLOT TITLE

☐ FOR

☐ AGAINST

Shall the Utah Constitution be amended to authorize the Lieutenant Governor, State Auditor, and State Treasurer each to appoint legal counsel?

### IMPARTIAL ANALYSIS

#### Current Provisions of the Utah Constitution

The Utah Constitution states that, unless otherwise provided in the Constitution, the Attorney General shall be the legal advisor of the Governor, Lieutenant Governor, State Auditor, and State Treasurer. In the case of the Governor, the Constitution provides otherwise by authorizing the Governor to appoint legal counsel to advise the Governor. Under current practice, the Governor's appointed legal counsel provides the Governor day-to-day legal advice, and the Attorney General continues to represent the Governor in lawsuits involving the Governor. The Constitution does not similarly authorize the Lieutenant Governor, State Auditor, or State Treasurer to appoint legal counsel to advise each of these state offices. Accordingly, the Attorney General is the legal advisor for each of these state officers for all purposes.

#### Effect of Constitutional Amendment C

Constitutional Amendment C authorizes the Lieutenant Governor, State Auditor, and State Treasurer each to appoint legal counsel.

#### Effective Date

If approved by voters, Constitutional Amendment C takes effect January 1, 2015.

#### Fiscal Impact

The enactment of Constitutional Amendment C will not alone have any fiscal impact. Depending on how the Lieutenant Governor, State Auditor, and State Treasurer choose to implement the Amendment, there may be an increase in costs to state government. If the Lieutenant Governor, State Auditor, or State Treasurer appoints legal counsel, as the Amendment allows, the increased annual costs to the state will be approximately \$120,000 for each new position. The costs may vary depending on a number of factors, including whether the position is full-time or part-time, whether the attorney is hired for a permanent position or on a contract basis, and the level of experience of the attorney hired.

(CONSTITUTIONAL AMENDMENT C CONTINUES ON THE NEXT PAGE)

# CONSTITUTIONAL AMENDMENT C (CONTINUED)

---

## ARGUMENT IN FAVOR

The Lieutenant Governor, State Auditor and State Treasurer do not currently have their own legal counsel. They rely on the Attorney General for legal advice. Recent events have also made it clear that there might be times when a conflict of interest could arise between the Attorney General and another constitutional officer. Also, there are times when these officers need more immediate access to legal counsel without having to wait for an official opinion from the Attorney General's office.

The Lieutenant Governor, State Auditor and State Treasurer need the ability to appoint their own legal counsel to advise in legal matters. Events of the past year highlighted the risks and concerns associated with one constitutional officer, whether the Lieutenant Governor or State Auditor, relying exclusively on the legal advice of the Attorney General's office when that constitutional officer investigates either the Attorney General or activities within that office. As such, it is important that these constitutional officers have the ability to rely on independent legal advice.

Also, each of these officers encounters critical legal issues on a daily basis. While the Attorney General has the constitutional role of serving as the preeminent legal advisor for each of these officers, there is no constitutional provision that provides for the hiring of legal counsel in the event of a conflict between the various offices.

The constitution currently authorizes the Governor to hire legal counsel, but the same right for these other constitutional officers needs to be specifically expressed in the Constitution. This amendment would put the rights of each executive branch constitutional officer in parity with each other. This amendment would not require the hiring of legal counsel, but would allow the option should the need arise. This amendment would not empower the legal counsel to supersede the Attorney General's legal advice and the Attorney General would still represent all executive branch officers in judicial proceedings.

Senator Todd Weiler  
Utah State Senate

Representative Mike McKell  
Utah State House of Representatives

---

## REBUTTAL TO ARGUMENT IN FAVOR

Amendment C sponsors' best argument seems to be that there may be situations where an attorney beholden to an executive branch office could be helpful to the state. If that is true, we should narrowly tailor a constitutional exemption to fit.

Amendment C would throw the doors wide for each executive branch officer to hire teams of legal staff - temporary or permanent - for any reason. This overreach would damage the checks and balances in our constitution.

- \* There is genius in the constitutional division of executive branch power.
- \* The AGs Office is capable, available and tends to apply a wider legal perspective. The constitution directs that they provide legal advice to state officers.
- \* In cases of conflict our system already allows for independent representation, including appointment of independent counsel.
- \* Amendment C would create a system of legal advisors who are beholden to individual politicians.
- \* History tells us that government, no matter how frugal or conservative it declares itself to be, is not good at limiting itself. Only vigilant citizens do that effectively.
- \* We should not give government everything it wants.

(CONSTITUTIONAL AMENDMENT C CONTINUES ON THE NEXT PAGE)

# CONSTITUTIONAL AMENDMENT C (CONTINUED)

---

## REBUTTAL TO ARGUMENT IN FAVOR (CONTINUED)

Listen to the audio records archived at [le.utah.gov](http://le.utah.gov), and you may be concerned by the lack of substantive constitutional consideration that attended this particular debate.

Voting no would direct the legislature to write language that more carefully solves the problem, then bring it back to a vote of the people in 2016.

Senator Wayne Niederhauser  
President of the Utah State Senate

---

## ARGUMENT AGAINST

### Fractured Executive Power

The founders of Utah thought it was important to break executive power into small pieces. Where there was formerly one executive – a governor, for example – Utah's founders divided the authority into five offices and charged that each be independently elected. There is genius in this separation. A divided team, working together, anchored separately in the voice of the people, provides more independent thought, fewer mistakes, and more citizen control.

Regardless of this wisdom, we've whittled away at our system over the years. Some of the historic changes may have been needed, but they are indicative of a subtle departure from the architecture our founders envisioned. I don't believe we should continue down this road.

The founders intended that the Attorney General's Office provide legal advice to our state officers.

### Proposed Change Too Broad

In our discussions, proponents could not enunciate the need for this constitutional change without pointing to rare or hypothetical cases of conflict, such as a hostile audit. In those cases, I believe our officials do need separate and independent counsel. The Utah Supreme Court agrees and has already set forth a process to ensure that governmental officers and entities have appropriate counsel where there is an actual or potential conflict. Hypothetical exceptions don't make this broad constitutional shift necessary.

It's easy to understand why officials want their own attorney. However, the preferences of executive power should not be a citizen's first priority when constitutional architecture is concerned. Even conservative administrations do a poor job limiting themselves.

There has been some assertion that no one intends to hire permanent full time attorneys or extra staff, but this proposal is written broadly to allow such expansion. It opens the door to increase the size and cost of government offices. The language needs to be narrowed so that hiring separate attorneys is only allowed in rare conflict of interest situations.

### Value of Independent Counsel

Employees of the Utah State Attorney General's Office are diligent and professional. They are independent. Their legal work is sound. Their advice must be based on the law, not the political desires or motivations of individuals.

In contrast, the primary obligation of any attorney hired under Amendment C would be to the political office who hired them.

(CONSTITUTIONAL AMENDMENT C CONTINUES ON THE NEXT PAGE)

# CONSTITUTIONAL AMENDMENT C (CONTINUED)

---

## ARGUMENT AGAINST (CONTINUED)

Under this proposal, the state would not have better attorneys or better legal advice. It would – for good or ill – have attorneys who are beholden to the personality and agenda of individual politicians.

### **Citizens Are The Final Check and Balance**

Power tends to overreach. I don't believe the proponents of this amendment mean to do harm, but it is an overreach nonetheless. In this case, you can prevent it.

Citizens shouldn't give government everything it wants. I hope you'll reject this overly broad amendment to our Constitution and let the legislature bring you a more narrowly crafted amendment in 2016.

Senator Wayne Niederhauser  
President of the Utah Senate

---

## REBUTTAL TO ARGUMENT AGAINST

The drafters of the state constitution had the wisdom and foresight to provide a mechanism for its amendment. They envisioned a changing world and understood the necessity for constitutional changes in certain circumstances.

Amendment C is a prime example of a necessary change to the constitution. All state constitutional officers face an array of legal issues each day, yet only two of the five constitutional officers have the authority to hire legal advisors to ensure timely legal advice, free from any conflict of interest.

If the Lieutenant Governor conducts an investigation against the Attorney General or if the Auditor audits the Attorney General's Office, they need the ability to hire legal counsel to advise on legal matters, and should not be required to rely on the advice given by the office under investigation.

Any constitutional amendment must go through a careful and deliberate review process before going before voters for their consideration. Amendment C went through that rigorous process and passed unanimously through the legislative standing committee, unanimously through the House of Representatives, and all but unanimously through the Senate, with only one no vote but without any Senator speaking against passage of the Amendment.

This Amendment mirrors that approved for the Governor in 1992. It has been well-tested and is recognized as a vital tool for the Governor.

Please vote to provide this necessary tool for each constitutional officer to do the best job they can in serving the citizens of Utah, and vote FOR Amendment C.

Senator Todd Weiler  
Utah State Senate

Representative Mike McKell  
Utah State House of Representatives

---

(CONSTITUTIONAL AMENDMENT C CONTINUES ON THE NEXT PAGE)

# CONSTITUTIONAL AMENDMENT C (CONTINUED)

## COMPLETE TEXT OF CONSTITUTIONAL AMENDMENT C

Joint Resolution on Appointment of Legal Counsel for Executive Officers  
2014 General Session

Utah Constitution Sections Affected:

Amends:

Article VII, Section 14

Article VII, Section 15

*Be it resolved by the Legislature of the state of Utah, two-thirds of all members elected to each of the two houses voting in favor thereof:*

Section 1. It is proposed to amend Utah Constitution, Article VII, Section 14, to read:

**Article VII, Section 14. [Duties of Lieutenant Governor -- Appointment of legal counsel.]**

(1) The Lieutenant Governor shall:

~~[(1)]~~ (a) serve on all boards and commissions in lieu of the Governor whenever so designated by the Governor;

~~[(2)]~~ (b) perform such duties as may be delegated by the Governor; and

~~[(3)]~~ (c) perform other duties as may be provided by statute.

(2) The Lieutenant Governor may appoint legal counsel to advise the Lieutenant Governor.

Section 2. It is proposed to amend Utah Constitution, Article VII, Section 15, to read:

**Article VII, Section 15. [Duties of State Auditor and State Treasurer --Appointment of legal counsel.]**

(1) The State Auditor shall perform financial post audits of public accounts except as otherwise provided by this Constitution.

(2) The State Treasurer shall be the custodian of public moneys.

(3) Each shall perform other duties as provided by statute.

(4) The State Auditor may appoint legal counsel to advise the State Auditor, and the State Treasurer may appoint legal counsel to advise the State Treasurer.

Section 3. **Submittal to voters.**

The lieutenant governor is directed to submit this proposed amendment to the voters of the state at the next regular general election in the manner provided by law.

Section 4. **Contingent effective date.**

If the amendment proposed by this joint resolution is approved by a majority of those voting on it at the next regular general election, the amendment shall take effect on January 1, 2015.